No. 77-256

In the Supreme Court of the United States

October Term, 1977

Tiger International, Inc. and The Flying Tiger Line Inc., petitioners

v.

Civil Aeronautics Board

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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INDEX

CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 554 F.2d 926. Civil Aeronautics Board Order 70-6-119 is reported at 54 CAB 700. Board Orders 73-12-106 and 75-2-1 (App. A and B, *infra*, pp. 1a-22a) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1977. The petition for a writ of certiorari was filed on August 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held untimely, under the 60-day limitation period for seeking direct review of orders of the Civil Aeronautics Board (49 U.S.C. 1486(a)), petitioners' 1975 challenge to a 1970 Board order.

2. Whether the court of appeals correctly applied the "arbitrary or capricious" standard of review, instead of the "substantial evidence" standard, to orders of the Civil Aeronautics Board, made in proceedings where no evidentiary hearings were required or held, imposing conditions on a tax allocation agreement between a holding company and its air-carrier subsidiary to prevent impairment of the carrier's financial welfare and ability to perform its certificate obligations.

STATUTE INVOLVED

The relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*, are set forth at Pet. 2-4.

STATEMENT

In July 1969, petitioners' predecessor, The Flying Tiger Line Inc. ("Flying Tiger"), a certificated all-cargo air carrier, requested the Civil Aeronautics Board to disclaim jurisdiction over a proposed reorganization under Section 408(a) of the Federal Aviation Act, 49 U.S.C. 1378(a), and to approve the transfer of the carrier's certificates of public convenience and necessity to the new operating company

to be formed under the reorganization plan.[1] Flying Tiger proposed to form a holding company, now Tiger International ("TI"), which would assume control of a new corporation, The Flying Tiger Line ("FTL"), which would continue the air carrier operation under the transferred certificates of the original carrier. The primary purpose of the reorganization was to facilitate diversification into businesses other than air transportation (Pet. App. 2a).

The Board declined to disclaim jurisdiction over the reorganization, inasmuch as a 1969 amendment to Section 408(a)(5) of the Federal Aviation Act (83 Stat. 103) made it unlawful for "any person" to acquire control of a certificated air carrier without Board approval.[2] Order 69-12-121 (December 29, 1969), 53 CAB 776. On May 5, 1970, by Order 70-6-119 (the "1970 Order"), the Board approved the reorganization subject to certain conditions (54 CAB 700). One condition required Board approval of intercompany transactions affecting FTL, the air carrier, which exceeded $100,000 in value.[3] The Board imposed this condition "in order to protect the public

[1] Section 401(h) of the Act, 49 U.S.C. 1371(h), requires Board approval before any certificate may be transferred.

[2] Prior to the amendment, Board approval of acquisition of control of a carrier was required only if the acquiring person was an air carrier or other common carrier or was engaged in a phase of aeronautics. The amendment required Board approval for an acquisition of control by "any other person" as well. See 49 U.S.C. 1378(a)(5).

[3] The Board subsequently raised the limit to $1,000,000 (Pet. App. 3a, n. 5).

against any impairment of the air carrier's certificate obligations which might arise by reason of the relationships or transactions among [TI] and its subsidiaries and affiliates * * *." 54 CAB at 703.

On June 24, 1970, Flying Tiger notified the Board that it accepted the terms and conditions of the 1970 Order (R. 100). Accordingly, the Board thereupon approved the transfer of the certificates from the original carrier to the new corporation, FTL. Order 70-6-153 (June 29, 1970), 54 CAB 699. TI then commenced its diversification program (Pet. App. 3a).

In 1973, pursuant to the condition concerning intercompany transactions, petitioners TI and FTL requested Board approval of a tax allocation agreement. Under the agreement, TI, the holding company, would file a consolidated tax return for all its subsidiaries. The subsidiaries would pay TI any tax that would have been due had the subsidiary filed a separate tax return, and each subsidiary would receive from TI the same refund it would have received had it filed a separate return. When a subsidiary's net operating loss, investment tax credits, or other tax credits reduced the group's consolidated tax liability, TI would credit the subsidiary for such tax savings. However, if the carrier subsidiary, FTL, provided such tax savings, its credit would be paid in cash. Petitioners sought approval of the agreement for the past tax years 1971 and 1972 as well as for the future. They did not request a hearing (Pet. App. 3a-5a).

The Board, by its "1973 Order," approved the agreement but added two requirements: (1) that the carrier could pay to the holding company only its proportionate share of the group's actual tax liability, and (2) that the carrier would issue its own credits to the other members of the group whose losses and tax credits sheltered the carrier's income from tax liability (Pet. App. 5a). Order 73-12-106 (December 27, 1973) (App. A, *infra*, pp. 1a-10a). Without these conditions, the agreement would have required FTL to pay TI $7.6 million for the 1971 and 1972 tax years, even though TI paid no consolidated tax in 1971 and only $1.2 million in 1972 (App. A, *infra*, p. 2a, n. 3). Thus, the Board explained, the holding company would have the use of such cash payments generated by the carrier "until the generation of operating profits by the other subsidiaries requires expenditure of the funds in payment of tax liabilities attributable to those subsidiaries" (*id.* at 4a). The Board's conditions were designed to "provide that the air carrier—rather than the holding company—benefit from the use of the air carrier's sheltered income pending any required expenditure of such funds on behalf of the other affiliates" (*ibid.*).

TI and FTL petitioned for reconsideration, again not requesting a hearing. They contended that the Board's order was inconsistent with the Board's prior decisions and that it would prevent them from effectively and efficiently operating as a holding company group (R. 182). By its "1975 Order," the Board denied reconsideration. Order 75-2-1 (February 3, 1975) (App. B, *infra*, pp. 11a-22a).

The Board's 1973 Order modifying petitioners' tax allocation agreement was, by its own terms, "a tempo-

rary measure," adopted pending completion of a thorough investigation of the benefits and risks inherent in air carrier reorganizations such as petitioners'. Pet. App. 5a; Order 73-12-106 (App. A, *infra*, p. 5a, n. 4). In that investigation, the *Air Carrier Reorganization Investigation* ("*ACRI*"), the Board ultimately concluded, after hearings, that the public interest requires that transactions between air carriers and their holding companies be subjected to a regulatory plan. Orders 75-10-65/66 (October 17, 1975) and 75-1-121 (January 30, 1976); see Pet. App. 5a-6a.[4] That plan deals specifically with tax allocation agreements and includes, with respect to such agreements, the same requirements that were attached by the Board to petitioners' tax allocation agreement in the 1973 and 1975 Orders. *Ibid.*

In 1975 FTL and TI petitioned for review in the court of appeals, challenging both the Board's modification of their tax allocation agreement in the 1973 and 1975 Orders and the Board's exercise of jurisdiction in the 1970 Order over their original reorganization. The court of appeals dismissed the challenge to the 1970 Order on the ground that petitioners had failed to challenge that order within the 60-day time limit set forth in Section 1006(a) of the Federal Aviation Act, 49 U.S.C. 1486(a) (Pet. App. 6a-10a). Then, holding that the timely challenge to the 1973

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[4] Petitioners and other carriers have sought judicial review of the *ACRI* orders. *United Air Lines, et al.* v. *Civil Aeronautics Board*, C.A.D.C., Nos. 75-2165 *et al.* (argued February 18, 1977).

and 1975 Orders should be considered under the "arbitrary or capricious" standard of judicial review, not the "substantial evidence" standard (Pet. App. 14a-19a), the court upheld those orders. It found that they "reflect rational decision making and, in particular, a not unreasonable evaluation of the tax-allocation agreement's potentially adverse impact on FTL's performance of its certificate obligations" (Pet. App. 19a).

ARGUMENT

Petitioners contend that the court of appeals erred because it (1) held untimely petitioners' challenge in 1975 to the 1970 Order asserting jurisdiction over the reorganization and requiring Board approval for inter-company transactions; and (2) ruled that the Board's 1973 and 1975 Orders were subject to the "arbitrary or capricious" standard of review rather than the "substantial evidence" standard. Neither issue merits this Court's review on this record.

1. The court of appeals was correct in declining to review the 1970 Order. Section 1006(a) of the Act, 49 U.S.C. 1486(a), is the sole basis for the court of appeals' jurisdiction. It provides that Board orders are subject to review "upon petition, filed within sixty days after the entry of such order * * *," and that "[a]fter the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

The statute plainly allows only sixty days within which to challenge an order; it includes no exception, such as petitioners propose (Pet. 14), for an order related to subsequent orders of which timely review is sought. To allow judicial review in the court of appeals after the statutory time limit has expired "would frustrate the congressional purpose, plainly evidenced * * *, to impose a 60-day limitation upon judicial review * * *." *Califano* v. *Sanders*, 430 U.S. 99, 108.

Petitioners can obtain no benefit from the statute's provision that an untimely petition for review may be filed "by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore." They failed to show any reasonable ground for their delay in attacking the Board's 1970 Order. As the court of appeals noted (Pet. App. 8a), petitioners chose in 1970 to accept the Board's conditional approval of their reorganization, with "full acceptance of the conditions" (*ibid.*, n. 12), and to forego seeking review in the court of appeals. For five years following that choice they accepted and enjoyed the benefits of the Board-approved reorganization. This Court has held that a firm whose merger was approved by a regulatory agency on specified conditions "cannot now be allowed to attack an officially approved condition of the merger while retaining at the same time all of its benefits. The impropriety of the attack is rendered twofold because it is not made in the merger proceeding but is attempted in a separate * * * proceeding." *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 502. Ac-

cord, *Dan-Air Services, Ltd.* v. *Civil Aeronautics Board*, 475 F. 2d 408, 412 (C.A.D.C.). Having chosen in 1970 not to challenge the Board's order but to accept its benefits, petitioners cannot now claim that their failure to make a timely challenge was based on reasonable grounds.[5]

Petitioners also err in contending (Pet. 13) that the court of appeals should have asserted jurisdiction under *Leedom* v. *Kyne*, 358 U.S. 184. That case involved a certification order of the National Labor Relations Board which, because it was not a final order, was not reviewable in the court of appeals by any available statutory procedure. Because there was "no other means, within their control * * *, to protect and enforce that right" (*id.* at 190; citation omitted), the Court held that employees challenging the order could do so in a *district court* under that court's general jurisdiction, conferred by 28 U.S.C. 1337, over suits arising under acts of Congress regulating commerce. Here, in contrast, the court of appeals had no such independent basis for exercising jurisdiction over petitioners' 1975 challenge to the 1970 Order. Its jurisdiction for direct review of orders of the Civil Aeronautics Board is both created and limited by Section 1006(a) of the Federal Aviation Act (49 U.S.C. 1486(a)). And petitioners here, unlike the

[5] Petitioners claim (Pet. 15) that their conduct in "foregoing timely review as prescribed by § 1006(a)" was justified by the "economic benefits" of the reorganization. Business convenience, however, is not a reasonable ground for choosing not to seek review within the statutory period.

plaintiffs in *Leedom* v. *Kyne*, had available to them a means to protect and enforce their asserted right in the court of appeals on timely petition for review of the 1970 Order, a means they chose not to invoke.

Similarly unsound is petitioners' contention (Pet. 14-15) that the court of appeals should have entertained their challenge to the 1970 Order because they alleged that the order was beyond the Board's "jurisdiction." Acceptance of this claim would all but eliminate the statute's 60-day limit (and comparable limits in other statutes), denying it force whenever the Board's action is alleged to exceed its statutory authority. Petitioners cite no case countenancing disregard of an express statutory time limit on such a ground. In contrast to petitioners' argument, this Court has recently held that a 60-day statutory limit on judicial review would be impermissibly undercut if a claimant for disability benefits could seek review from the denial of a petition to reopen his claim (*Califano* v. *Sanders*, *supra*, 430 U.S. at 108), and that the failure of the Attorney General of the United States to object to a voting law change within the statutory period of sixty days barred his subsequent objection even when authorized by court order (*Morris* v. *Gressette*, No. 75-1583, decided June 20, 1977, slip op. 11-12).

2. Petitioners also contend (Pet. 8-12) that the court of appeals applied an erroneous standard of review by examining the 1973 and 1975 Orders under the "arbitrary or capricious" standard instead of the "substantial evidence" test. We submit that as ap-

plied to these rulings of the Board, which did not turn on findings of fact, the two standards are not significantly different. Especially since the rulings in this case have now been superseded by an industry-wide regulation imposing similar conditions on tax allocation agreements, there is no need for this Court to review the standard that was applied in this case.

No hearing was requested by petitioners when they submitted their tax allocation agreement to the Board for its approval. No hearing was required by the statute.[6] Under the Administrative Procedure Act, reviewing courts are directed to determine whether agency action is supported by substantial evidence only in cases "subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency

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[6] As the court of appeals noted (Pet. App. 18a, n. 18):

> TI and FTL do not contend that the CAB was statutorily required to hold a hearing on their application for approval of the tax allocation agreement or on their petition for reconsideration. Indeed, the record here precludes such an argument. In 1960, Congress amended section 408 of the Act, 49 U.S.C. § 1378, to permit the CAB, in certain circumstances and pursuant to certain procedures, to dispense with a hearing in cases arising under that section. Act of Sept. 13, 1960, Pub. L. No. 86-758, § 1, 74 Stat. 901, *amending* 49 U.S.C. § 1378(b). In the proceedings leading to the 1970 Order, the CAB, after fully complying with that amendment, dispensed with a hearing. In that Order, the CAB retained jurisdiction to impose, without a hearing, further conditions. Flying Tiger accepted this provision, along with all others in the Order. Under authority of this provision, the CAB then conducted, without a hearing, the proceedings leading to the 1973 and 1975 Orders.

hearing provided by statute" (5 U.S.C. 706(2)(E)).[7] The Administrative Procedure Act thus recognizes a dichotomy between review of agency findings made on a hearing record, where the "substantial evidence" standard applies, and review of agency rulings that do not turn on findings of fact, where the "arbitrary or capricious" standard is applicable (see 5 U.S.C. 706 (2)(A)). This Court has also recognized that dichotomy. In *Camp* v. *Pitts*, 411 U.S. 138, which involved a determination by the Comptroller of the Currency that was not required to be made after a hearing on the record, the Court held that "the proper standard for judicial review of the Comptroller's adjudications is not the 'substantial evidence' test which is appropriate when reviewing findings made on a hearing record," but "[t]he appropriate standard for review was * * * whether the Comptroller's adjudication was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' * * *." 411 U.S. at 141-142.

Petitioners contend, however, that this dichotomy does not apply to judicial review under the Federal Aviation Act. Because Section 1005(f) of the Act (49 U.S.C. 1485(f)) provides that "[e]very order of * * * the Board shall set forth the findings of fact upon which it is based," and because Section 1006(e) of the Act (49 U.S.C. 1486(e)) provides that "[t]he findings of fact by the Board * * * if supported by

[7] Sections 556 and 557 of 5 U.S.C. concern proceedings required by statute to be determined on the record after an opportunity for an agency hearing.

substantial evidence, shall be conclusive," petitioners argue that the "substantial evidence" test applies whether or not a hearing is conducted on the record and whether or not a ruling of the Board turns on findings of fact. In a case such as this one, petitioners' argument not only would put the Federal Aviation Act at odds with the principles of judicial review recognized by the Administrative Procedure Act and by this Court in *Camp* v. *Pitts* but, as the court of appeals noted (Pet. App. 18a-19a), it would also require evidentiary proceedings where there were no issues of fact to be resolved, where no hearing was requested or held, and where Congress has expressly dispensed with a hearing requirement.[8]

[8] In 1960, Congress amended Section 408(b) of the Federal Aviation Act to permit the Board to dispense with hearings where none had been requested and certain conditions were met. 74 Stat. 901, 49 U.S.C. 1378(b), states:

> Provided further, That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

As the court of appeals noted, "[t]he primary purpose of the 1960 amendment permitting the CAB to dispense with a

In any event, in the context of this case, where the Board's rulings of 1973 and 1975 did not turn on findings of fact, the two standards of judicial review are not significantly different. By its original 1970 Order subjecting inter-company transactions to Board approval, the Board sought to insure fair treatment for the carrier in the new corporate regime so as to protect against impairment of its financial position and its ability to provide air services (54 CAB at 703). When petitioners in 1973 requested the Board to approve their tax allocation agreement, the Board was required to make a predictive and policy judgment concerning the benefits and risks of the agreement as they affected the carrier's ability to perform its certificate obligations. In making that assessment the Board noted—a fact based on petitioners' own submission and apparently uncontested—that under the agreement the carrier would pay to the holding company, for the years 1971 and 1972, amounts of cash far in excess of the holding company's actual tax liability (Order 73-12-106, App. A, *infra*, p. 2a, n. 3). Given the terms of the agreement, the Board made the judgment that, "[c]onsidering the holding company's interlocking relationships with and its effective control of the air carrier and the other affiliates, it is, in our view, altogether unrealistic to expect that the air carrier or the other affiliates would not be completely responsive to the holding

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hearing in some cases * * * was to facilitate CAB disposition of section 408 cases, not to hinder that process." Pet. App. 19a, n. 20.

company's bidding" (Order 75-2-1, App. B, *infra*, p. 21a). The Board therefore concluded that, "inasmuch as FTL may continue in the foreseeable future to be a principal, if not the primary, source of shelterable income" (Order 73-12-106, App. A, *infra*, p. 4a), it was justified in imposing conditions designed to protect the carrier's ability to perform.

Such a ruling turned essentially on a predictive judgment concerning the benefits and risks of the agreement. Cf. *Frontier Airlines, Inc.* v. *Civil Aeronautics Board,* 439 F. 2d 634, 640 (C.A.D.C.). The Board's decision concerning the conditions necessary to protect the carrier rested "in the final analysis on an essentially legislative policy judgment, rather than a factual determination, concerning the relative risks of underprotection as compared to overprotection." *Industrial Union Department, AFL-CIO* v. *Hodgson,* 499 F. 2d 467, 475 (C.A.D.C.). When a court reviews an administrative determination of this kind, the concepts of "substantial evidence" and not "arbitrary or capricious" tend to converge (*Associated Industries of New York State, Inc.* v. *United States Department of Labor,* 487 F. 2d 342, 349-350 (C.A. 2)), just as they do when general rules adopted after informal rule-making are subject to review. See *Industrial Union Department, AFL-CIO* v. *Hodgson, supra.* Cf. *Island Airlines, Incorporated* v. *Civil Aeronautics Board,* 363 F. 2d 120, 125-126 (C.A. 9). While the two tests are statutorily separate under the Administrative Procedure Act (*Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,*

419 U.S. 281, 284),[9] whether they are actually coterminous in a given case depends on the nature of the determination under review. Some Board actions rest on factual predicates that require support by substantial evidence; other actions involve the kind of policy prediction presented by this case. In the latter situation the only "substantial evidence" that can be examined on review is the presence or absence of a rational basis for the administrative decision.

For these reasons, petitioners err in contending that the ruling below conflicts with decisions of other circuits purporting to apply the substantial evidence test in Board nonhearing cases. See, *e.g.*, *Law Motor Freight, Inc.* v. *Civil Aeronautics Board*, 364 F. 2d 139 (C.A. 1), certiorari denied, 387 U.S. 905; *Nebraska Department of Aeronautics* v. *Civil Aeronautics Board*, 298 F. 2d 286 (C.A. 8); *Pillai* v. *Civil Aeronautics Board*, 485 F. 2d 1018 (C.A.D.C.). Unlike this case, those decisions did not involve Board action consisting essentially of a predictive policy choice.[10]

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[9] In *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra*, the Court applied the "arbitrary or capricious" test to so much of an Interstate Commerce Commission decision, made after a record hearing, as involved a prediction of the burdens and benefits of new competitive service. The supporting factual predicates were concededly sustained by substantial evidence.

[10] As *Bowman Transportation, Inc.*, *supra*, demonstrates (see n. 9, *supra*, pp. 15-16), predictive policy choices must be judged under the "arbitrary or capricious" standard. The language of Sections 1005(f) and 1006(e) of the Act, 49 U.S.C.

Finally, the conditions imposed by the Board's 1973 and 1975 Orders on petitioners' tax allocation agreement have been superseded by similar conditions in the *ACRI* decision which the Board adopted in 1976. *See* pp. 5-6, *supra*. Since petitioners, with other holding companies and their carrier subsidiaries, are challenging the *ACRI* orders before the Court of Appeals for the District of Columbia Circuit (*ibid.*; see Pet. App. 6a, n. 9),[11] there is no need for the Court to consider this case now.

1485(f) and 1486(e), quoted *supra*, pp. 12-13, does not compel use of the substantial evidence test in cases to which it would not apply under the Administrative Procedure Act, *i.e.*, cases not involving disputed facts found after a record hearing. It simply means what it says: that the Board's findings of fact shall be conclusive if they are supported by substantial evidence.

[11] As the court of appeals noted (Pet. App. 6a, n. 9), the *ACRI* orders do not moot the instant case. The *ACRI* orders were adopted in May 1976 and are prospective only. Therefore, they do not control petitioners' tax allocation practices for the two and one-half year period between adoption of the 1973 conditions and the *ACRI* orders.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1977.

APPENDIX A

Order 73-12-106

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C. on
the 26th day of December, 1973

Docket 21223

[Served Dec. 27, 1973]

Application of

THE FLYING TIGER LINE INC. AND
THE FLYING TIGER CORPORATION

for approval of a tax allocation agreement under paragraph 3 of Order 70-6-119.

ORDER APPROVING AGREEMENT

The Flying Tiger Line Inc. (FTL) and The Flying Tiger Corporation, (FTC) request modification of paragraph 3 of Order 70-6-119,[1] adopted May 5, 1970, to the extent necessary to permit implementation of a tax allocation agreement effective with respect to taxable years 1971 and 1972, as well as prospectively.

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[1] Order 70-6-119, May 5, 1970, approved the initial reorganization resulting in the formation of FTL's holding company parent, FTC. Ordering paragraph 3 thereof prohibited transactions between FTL and FTC aggregately amounting to $100,000 or more, absent prior Board approval.

The agreement would treat the air carrier, for tax purposes, as if it were otherwise unaffiliated. Thus, the airline would pay to the holding company any tax that would have been due were it filing returns as an independent company, and would receive a refund were it so entitled to one as a separate company.

Under circumstances where net operating losses, investment tax credits or other tax credits generated by FTL's operations are applied in computing payment of taxes otherwise due from operations of its affiliates FTL will immediately receive in cash the value of the taxes saved.[2] Other subsidiaries of FTC are only entitled to receive a credit rather than cash under circumstances where they have contributed tax credits or operating losses to reduce or eliminate overall tax liability.[3]

No comments have been received.

After consideration, we have determined to approve the tax plan, subject to exceptions and conditions. Generally, we are satisfied that certain possibilities otherwise adverse to the carrier's interests are absent: no penalties will accrue to the air carrier by virtue of its inclusion in the consolidated tax agreement; the carrier will receive fair treatment with

[2] Applicants reserve the right to adopt a different standard at a later date should it then appear that FTL would have tax credits or operating losses which it otherwise would not be able to use.

[3] Upon approval of this agreement, FTL would pay to the holding company $7.61 million representing its 1971 and 1972 independent tax liability. The group as a whole paid no taxes in 1971 and only $1.2 million in 1972.

respect to the use of its tax credits and loss carryforwards and carrybacks; and the implementation of the agreement will have no direct adverse impact on the carrier, inasmuch as Flying Tiger Line will in no event pay more to the holding company than it would pay to the government as an independent entity. Additionally, the agreement should in fact result in certain benefits by allowing the air carrier to realize an immediate cash payment for any tax credits or net operating loss used by the holding company which would not otherwise have accrued to the air carrier until some future year.

As submitted, the agreement would provide a further benefit to the air carrier, inasmuch as tax benefits generated by any member would not be lost through that member's inability to utilize them within a given statutory period to the extent that such benefits had been previously applied by the holding company parent in computing the consolidated return. However, inasmuch as applicants specifically reserve the right to modify the agreement should Flying Tiger Line be in a position to so benefit, this advantage will not likely accrue to the air carrier.

On the other hand, one aspect of the agreement poses some difficulty. Under the agreement, the air carrier will be required to pay the amount of its independent tax liability to the holding company parent regardless of whether the holding company's consolidated tax return requires the payment of taxes to the Government. To the extent cash payments by the air carrier exceed the group's consolidated tax

liability, the holding company would have the use of such funds until the generation of operating profits by the other subsidiaries requires expenditure of the funds in payment of tax liabilities attributable to those subsidiaries, and payable on their behalf by the holding company pursuant to the agreement.

In this respect, we will impose an alternative format, which would effect no different impact on other subsidiaries of the holding company, but which would provide that the air carrier—rather than the holding company—benefit from the use of the air carrier's sheltered income pending any required expenditure of such funds on behalf of the other affiliates. Particularly, we will require that the air carrier itself retain possession of its sheltered profits, rather than turning them over to the holding company; the air carrier might allow a credit to affiliates contributing to the shelter, as would the holding company pursuant to the instant agreement, and might subsequently pay tax contributions on behalf of contributing affiliates should any such affiliate subsequently be in a position to have applied its contributed tax benefits as an independent entity.

We believe such an alternative plan to be more in the interests of the air carrier than the instant one, and to be equitable to the holding company and to each affiliate. This is especially true inasmuch as FTL may continue in the foreseeable future to be a principal, if not the primary, source of shelterable income.

The effect of our modification will be to permit FTL to contribute, with other affiliates, a proportionate share of the group's consolidated tax liability, and to issue credits to the affiliates whose losses and tax credits were utilized to shelter the air carrier's taxable income. Contributions by the air carrier to the group's consolidated tax liability should be no more than the sum of (a) an amount proportionate to the air carrier's independent tax liability in relation to the independent tax liability of all members of the group showing a taxable income, and (b) an amount required to redeem credits given by the air carrier to other subsidiaries in prior years.[3[sic]] The tax proposal should be modified accordingly and the revised tax plan should be forwarded to the Board in this docket.[4]

To insure the Board's ability to monitor the subsequent action of applicants pursuant to approval herein granted, we will require applicants to file with the Board a copy of their consolidated tax return for every year in which this proposal is effectively employed, as well as workpapers for each such year

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[3[sic]] The Appendix provides an illustration of the proper application of this formula.

[4] Approval of the tax plan pursuant to condition 3 of Order 70-6-119 is necessarily a temporary measure, to be superceded by our decision in the *Air Carrier Reorganization Investigation* and any resulting implementation of tax review standards. Approval herein granted will extend to years 1971, 1972 and to any subsequent year for which a consolidated return is filed prior to our final action in the *Air Carrier Reorganization Investigation.*

indicating the steps employed to reach the ultimate allocation of cash payment and credits given.[5] The workpapers should at minimum set forth—for the holding company and for each subsidiary—separate taxable income (or losses) both before and after adjustments, total tax credits (by type) and losses generated for the year, total credits and losses carried forward from the prior year, estimated independent tax liability, total credits given by one subsidiary to another, total cash contribution with respect to the group's consolidated tax liability, and the manner of application of the foregoing items in the computation of the current consolidated tax return. The Board should be promptly apprised of subsequent adjustments of the consolidated return.[6]

The current tax proposal, as written, will in most cases adequately protect the air carrier in the event the holding company parent opts to revert to filing of individual tax returns. However, inasmuch as the agreement does not purport to provide for every contingency which might arise in the event of such reversion, we will require prior Board approval of any termination of the agreement. Moreover, to insure continued fair treatment to the air carrier respecting

[5] The filing of a consolidated tax return for calendar 1971 will not be required to the extent it is currently on file with the Board, provided that any adjustments in the 1971 consolidated returns be brought to the Board's attention. However, workpapers for 1971 will be required.

[6] Of course, the applicants will be given confidential treatment with respect to this information.

tax returns, we will require prior Board approval of any subsequent modification of the tax agreement,[7] provided, however, that such prior approval shall not be required with respect to specific changes to be made pursuant to the modifications imposed herein.[8]

ACCORDINGLY, IT IS ORDERED THAT:

The subject tax proposal be and it hereby is approved pursuant to ordering paragraph 3 of Order 70-6-119, subject to the following:[9]

a. the terms of the agreement shall be modified to provide that the air carrier shall retain the use of its sheltered income, subject to (a) proportionate contributions to the group's consolidated tax liability, and (b) redemption of credits issued in prior years by the air carrier to its affiliates, both as discussed in the body of this order;

[7] This condition is particularly required since the holding company parent reserves the right to adopt a different standard at a later date should FTL appear unable to utilize, as an independent entity, the tax benefits it generates. At the time of any such modification, it will be necessary to assure that Flying Tiger Line participates in any tax savings from its inclusion in the consolidated return.

[8] Payment and credit transactions hereby approved shall not be included in calculating the $100,000 figure which triggers the prior-approval requirement of Order 70-6-119, ordering paragraph 3.

[9] The payment and credit transactions authorized by this paragraph shall not be included in calculating the $100,000 figure which triggers the prior approval requirement of Order 70-6-119, ordering paragraph 3.

b. the parties shall neither terminate nor modify the terms of the tax agreement without prior Board approval, provided, however, that such prior Board approval shall not be required with respect to changes required in accordance with paragraph (a) above;

c. for each year in which this proposal is applicable, including 1971 and 1972, applicants shall file workpapers described in the body of this order; and for each year during which the agreement is applicable, beginning 1972, applicants shall file a copy of their consolidated tax return;

d. The approval granted herein shall be subject to modification, revocation, or attachment of further or different conditions as the Board may, without hearing, find appropriate in the public interest; and

e. The approval granted herein shall not in any manner be relied upon by FTL for ratemaking or other regulatory purposes not specifically considered herein.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

[SEAL]

APPENDIX

Year 1	Air Carrier	Co. A	Co. B	Co. C	Consolidated Return
Income	1,000	2,000	3,000	4,000	10,000
Tax Liability *	500	1,000	1,500	2,000	5,000
Contributed to Consolidated tax liability	500	1,000	1,500	2,000	5,000
Year 2					
Income	1,000	(4,000)	3,000	4,000	4,000
Tax Liability *	500	(2,000) **	1,500	2,000	2,000
Contributed to Consolidated tax liability:					
Independent tax liability	500	—	1,500	2,000	
Less Credit to Co. A	(250)	2,000	(750)	(1,000)	
Total contribution	250	—0—	750	1,000	2,000
Year 3					
Income	1,000	2,000	3,000	4,000	10,000
Tax Liability *	500	1,000	1,500	2,000	5,000
Contribution to Consolidated tax liabiltiy:					
Independent tax liability	500	1,000	1,500	2,000	
Redeem credits given in prior year	125	(1,000)	875	500	
	625	—0—	1,875	2,500	5,000

In Years 1 and 2, the air carrier contributions to the group's consolidated tax liability are in an amount proportionate to the air carrier's independent tax liability in relation to the independent tax liability of all members of the group showing a taxable income. In Year 2, however, the air carrier also credits Co. A for the use of Co. A's tax losses, the amount of the credit given being calculated in the same ratio used

* Assumes a tax rate of 50%

** Tax effect of loss

to determine the air carrier's contribution to consolidated tax liability.

In Year 3, the air carrier again contributes its proportionate share of consolidated tax liability, as calculated on the total taxable income of all members showing a profit. However, it makes an additional cash payment on behalf of Co. A to redeem a proportionate share of credits given to Co. A in the prior year, relative to the amount of total available credits which Co. A can utilize to offset its income for the year.

At the end of Year 3, the air carrier would still have outstanding $125 in credits due Co. A, to be proportionately contributed on that company's behalf to the extent that Co. A is able to call upon them in future years.

APPENDIX B

Docket 21223 Order 75-2-1

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

[Emblem]

THE FLYING TIGER LINE INC.
CONTROL RELATIONSHIPS: INTERCOMPANY TAX ALLOCATION

Docket 21223

[Served February 4, 1975]

Order 75-2-1

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 3rd day of February, 1975

Application of The Flying Tiger Line Inc. and Tiger International, Inc. (formerly The Flying Tiger Corporation), for approval of a tax allocation agreement under paragraph 3 of order 70-6-119, as amended

ORDER DENYING PETITION FOR RECONSIDERATION

By order 73-12-106, December 26, 1973, the Board approved, subject to various conditions and modifications, a tax allocation agreement among The Flying

Tiger Line Inc. (FTL), The Flying Tiger Corporation (FTC), now known as Tiger International, Inc. (TI), and their affiliates, filed pursuant to paragraph 3 of order 70-6-119, dated May 5, 1970, as amended.[1] The proposed agreement[2] was approved subject, *inter alia,* to a condition modifying the proposed utilization of tax savings resulting from the filing of a consolidated tax return by the TI system of affiliated companies.[3]

[1] Order 70-6-119, amended by order 71-7-6, July 1, 1971 and order 72-2-6, Feb. 2, 1972, *inter alia,* prohibited intercompany transactions within the TI system of subsidiaries and affiliated companies which amount in the aggregate to $100,000 or more in any calendar year without prior Board approval. Subsequent to its decision in this proceeding, the Board by order 74-5-90, May 17, 1974 increased the dollar limitation to $1 million.

[2] The agreement treated the air carrier, FTL, for tax purposes as if it were otherwise unaffiliated. It provided that the air carrier would pay to TI, the holding company, any tax that would have been due were it filing returns as an independent company, and would receive a refund were it entitled to one as a separate company. It further provided that under circumstances where net operating losses, investment tax credits, or other tax credits generated by FTL's operations are applied in computing payment of taxes otherwise due from operations of the TI group, FTL would immediately receive in cash the value of the taxes saved. Under comparable circumstances, other subsidiaries of TI would be entitled to receive redeemable credits from TI.

[3] The Board stated that contributions by the air carrier to the group's consolidated tax liability should be no more than the sum of (a) an amount proportionate to the air carrier's independent tax liability in relation to the independent tax liability of all members of the group showing a taxable income, and (b) an amount required to redeem credits given by the

TI and its wholly owned subsidiary, FTL, filed a timely petition for reconsideration of order 73-12-106, containing a request to present oral argument before the Board.[4]

Petitioners contend, in effect, that the modification of the original tax allocation agreement is inconsistent with the Board's policy and practice and would prevent petitioners and their affiliates from conducting business effectively and efficiently as a holding company group.

In support of their contentions, petitioners state, *inter alia,* that the Board has consistently recognized that tax allocation is a necessary concomitant of consolidated tax reporting, and generally has had only two concerns: (1) that an air carrier within a corporate group not be assessed an amount greater than its independent tax liability would have been had it reported on a separate basis, and (2) that an air carrier be given immediate credit for the utilization by affiliates of its losses, credits, and deductions in lowering overall taxes. As a basis for their position that the Board's concern is so limited, petitioners refer to Part 241 of the Board's Economic Regulations, to order 69-7-102, July 15, 1969, involving the acquisition of Air West by Hughes Tool Company, and to the decision of the Administrative Law Judge (Au-

air carrier to other subsidiaries in prior years, and ordered that, subject to these conditions, FTL shall retain the use of its sheltered income.

[4] Petitioners' contentions are set forth and amply discussed in their filing, and we find that no useful purpose would be served by oral argument.

gust 27, 1973) in the *Air Carrier Reorganization Investigation* (docket 24283 *et al.*).[5]

Petitioners cite and appear to rely, at least in part, upon Part 241 of the Board's Economic Regulations[6] as amended by ER-707 on September 22, 1971, effective on January 1, 1972.[7] We find no inconsistency between the recordkeeping and reporting requirements of Part 241 and our decision in order 73-12-106.

Part 241 was designed to provide for a uniform system of accounts and reports, requiring that all certificated air carriers record their accounts and make reports to the Board uniformly in accordance with this system. ER-707 was designed to provide more complete disclosures of transactions within affiliated groups of companies, and to set forth standards in accounting for such transactions. Applying the general objectives of this amendment, section 2-18(d) prescribes a method for recording income taxes of a regulated air carrier holding a certificate of public convenience and necessity and of companies affiliated with it.[8]

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[5] The Reorganization Investigation is presently before the Board for review.

[6] Part 241—Uniform System of Accounts and Reports for Certificated Air Carriers (14 CFR 241).

[7] The Board gave notice that it had the amendment under consideration by circulation of EDR-187, dated Sept. 9, 1970 (docket 22546) and published at 35 F.R. 14464.

[8] Sec. 2-18(d) provides as follows:

"(d) Income taxes shall be allocated among the transport entities of the air carrier, its nontransport divisions, and members of an affiliated group. Under circumstances in which income taxes are determined on a consolidated basis by an air carrier and other mmebers of an affiliated group, the income tax expense to be recorded by the air carrier shall be the same as would result if determined for the air carrier separately for all time periods, except that the tax effect of carryback and carryforward operating losses, investment tax credits, or other tax credits generated by operations of the air carrier shall be recorded by the air carrier during the period in which applied in settlement of the taxes othewise attributable to any member, or combination of mmebers, of the affiliated group. Any difference between the income tax so recorded and the amount at which settlement is to be made shall be recorded in subaccount 88.1 Intercompany Transactions Adjustment—Credit or in subaccount 89.1 Intercompany Transactions Adjustment—Debit, as is appropriate."

The language of section 2-18(d), together with the history of its promulgation, like that of Part 241 in its entirety, clearly indicates that the rule and its amendments merely establish recordkeeping and reporting procedures and methods in order to provide the Board with more complete disclosures of transactions within affiliated groups of companies. The method prescribed by section 2-18(d) for recording income taxes on a consolidated basis requires only that the income tax expense to be recorded by the air carrier shall be the same as would result if determined for the air carrier separately for all time periods, and that the tax effect of carryback, carryforward operating losses, investment tax credits, and other tax credits generated by the air carrier shall be recorded by the air carrier during the period in which applied in settlement of the consolidated tax liability. The recordkeeping and reporting requirements of section

2-18(d) are by no means declaratory of Board policy with respect to particular intercompany agreements relating to the subject matter of the reporting, and in our view do not pertain to or focus upon the issue raised in this petition, viz, the allocation of tax savings pursuant to an agreement between a certificated air carrier and its affiliates. Moreover, to the extent that section 2-18(d) may be considered as bearing, however remotely, upon any Board policy or practice with respect to such issues, we find no inconsistency with our decision in order 73-12-106. Further, we are unable to conclude that our decision in order 73-12-106 is harmful to the financial integrity of the air carrier, FTL, or more disadvantageous to the air carrier than the tax allocation guidelines contained in the decision of the Administrative Law Judge in the *Air Carrier Reorganization Investigation* referred to by petitioners.[9]

Petitioners also suggest that the continued adherence to Board order 73-12-106 would not be in accord with Board policy and practice as established by Board precedent. However, petitioners acknowledge that, about 1 month prior to order 73-12-106, presently under reconsideration, the Board had adopted, in order 73-11-8, October 23, 1973[10] a similar tax

[9] However, we wish to stress that our action herein should not be regarded as prejudging in any way our final determination on the merits of any issue in the Reorganization Investigation.

[10] This order involved an application filed by Braniff Airways, Incorporated, and Braniff International Corporation in docket 24048.

allocation policy. The tax allocation requirement in that case, which permitted no retention of consolidated income tax savings by the parent holding company, Braniff International Corporation (BIC), was imposed as a condition to the Board's approval of a reorganization plan involving Braniff Airways' formation of BIC, similar to FTL's formation of FTC.[11]

Other cases cited by petitioners do not involve instances of Board approval of an air carrier's formation of a holding company,[12] and are not otherwise inconsistent with the tax allocation determination in the *Braniff* case or in order 73-12-106, under reconsideration herein.

In *Ling-Temco-Vought, Inc., Control of Braniff*, order E-25989, November 17, 1967, the issue of income tax allocation was neither presented to nor determined by the Board. We are not disposed to view the Board's inaction with respect to this issue at that time as a determination of Board policy with respect thereto.

In the *Acquisition of Air West, Inc., by Hughes Tool Company*, order 69-7-102, July 15, 1969, the Board imposed a condition on its approval of the ac-

[11] Order 70-6-119, *supra*.

[12] United Air Lines, Inc., order 69-4-67, Feb. 17, 1969, also involved an air carrier's formation of a holding company, UAL, Inc. However, that proceeding antedated P.L. 91-62 (Aug. 20, 1969, effective on Aug. 5, 1969), which amended, *inter alia*, sec. 408 of the Act (see order 70-6-119, *supra*). Since the Board was then not empowered to assert jurisdiction over the reorganization, and did in fact disclaim jurisdiction, it imposed no conditions.

quisition which provided, *inter alia*, that "In no event shall the tax burden or relief related to the air carrier division (Air West Division of Hughes Tool Company) be less favorable to that division as part of Hughes Tool Company than would have been the case had the division been taxed as a separate corporation." Thus, the Board expressly established at once both a *ceiling* of tax burden and a *floor* of tax relief for an air carrier division of an operating company, and implicitly recognized the same parameters for an air carrier subsidiary of such company (order 69-12-66, November 26, 1969). Not inconsistently therewith, by order 73-12-106 we made a determintaion which focused on the intervening area with respect to a consolidated income tax allocation agreement between an air carrier-formed holding company and the air carrier subsidiary. In these circumstances, we do not find that determination, even though it may result in tax relief to the air carrier above the minimum requirement, to be contrary to established Board precedent, disadvantageous to the air carrier, or as imposing an undue tax burden on the air carrier-formed holding company.[13]

Petitioners advance several contentions aimed at demonstrating adverse consequences of the Board's

[13] We reiterate, as stated in footnote 9 *supra*, that our action herein should not be regarded as prejudging in any way our final determination on the merits of the issues in the Air Carrier Reorganization Investigation, the scope of which is limited to air carrier-formed holding companies (order 74-6-18, June 4, 1974) and includes United Air Lines, Inc., as well as Braniff and FTL as parties.

decision in order 73-12-106. First, petitioners state that this decision frustrates national tax policy in that petitioners and their affiliates, North American Car Corporation (NAC), are deprived of tax benefits, such as accelerated depreciation and investment tax credits. It is perfectly obvious that insofar as the petitioner, FTL, is concerned order 73-12-106 deprives the air carrier of no tax benefits whatsoever. Indeed, it appears that the thrust of petitioners' complaint is that FTL is acquiring more than its share of combined group tax savings. With regard to NAC and other subsidiaries of TI, we believe that the availability to them of redeemable tax credits, as provided in order 73-12-196, implements rather than frustrates national tax policy.[14] As to TI, there is no contention that the parent holding company generated any part of the total tax savings, and for this reason, as in the Braniff case, we perceive no inequity to the holding company parent of FTL. To the contrary, as a consequence of our decision in order 73-12-106, TI could share in the total tax benefits arising from the combined tax reporting through the availability of FTL's immediate tax benefits (and other tax savings lodged with FTL) for the payment of dividends in accordance with paragraph 3(b) of order 74-5-90, May 17, 1974.[15]

[14] TI's subsidiary, NAC, for example, will have available to it no lesser tax benefits than it would have received had it filed its income tax return as a separate entity.

[15] This paragraph, further amending order 70-6-119, as previously amended by orders 71-7-6 and 72-2-6, provides as follows:

Second, petitioners contend that order 73-12-106 makes it impossible for TI to function as a holding company. However, petitioners acknowledge that the holding company does not rely exclusively upon the utilization of tax savings from consolidated tax returns as a means of assuring the availability of funds for investment in its nonairline subsidiaries. Indeed, as discussed above, the tax savings lodged with FTL could in some circumstances make available to the holding company an increased dividend distribution with which to further its investment policies.

Third, petitioners contend that tax savings, if lodged with the holding company, could be better utilized in the latter's discretion for investment in its subsidiaries "as needed" than by FTL. We regard this contention as highly speculative, and it may entail a distribution of tax savings to affiliates without

"3(b). FTL shall make no payment of dividends on its common stock without prior Board approval, except with respect to dividend payments for any given calendar year which are paid out of retained earnings in an aggregate amount not in excess of 50 percent of its net income after special items (line 9799 on CAB Form 41 Schedule P-1.2), as determined in accordance with Part 241 of the Board's Economic Regulations (the Uniform System of Accounts), for the calendar year immediately prior thereto, provided that verification of compliance with this requirement, in a manner acceptable to the Bureau of Accounts and Statistics, is made by FTL within 90 days of the end of the calendar year for which such dividend payments have been made, setting forth, *inter alia*, the amount of retained earnings, net income, and percentage basis for the payment of such dividends; * * *"

any relationship to their respective contributions to the combined tax savings.

Petitioners have offered, as an alternative to our decision in order 73-12-106, to accept an allocation agreement which would provide that tax allocation payments by FTL or other affiliates to TI be made discretionary, rather than mandatory as originally agreed upon. This proposal is entirely illusory. Considering the holding company's interlocking relationships with and its effective control of the air carrier and the other affiliates, it is, in our view, altogether unrealistic to expect that the air carrier or the other affiliates will not be completely responsive to the holding company's bidding.

In view of the foregoing and in light of the countervailing considerations for preserving the integrity of the air carrier against inroads by TI in favor of nonair carrier investments, we find, on balance, that any alteration of our decision in order 73-12-106 would not be warranted.

ACCORDINGLY, IT IS ORDERED THAT:

1. Petitioners' request for reconsideration of order 73-12-106 be and it hereby is denied;[16] and

[16] The payment and credit transactions authorized by order 73-12-106 shall not be included in calculating the monetary limitation figure which triggers the prior-approval requirement of order 70-6-119, ordering paragraph 3, as amended. However, it is expected that within 90 days after the filing of any consolidated Federal income tax return by TI which includes FTL, FTL shall file with the Bureau of Operating Rights a statement setting forth (a) the amount of tax paid

2. All other motions and requests herein be and they hereby are denied.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

[SEAL]

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by FTL in connection with the filing of such consolidated Federal income tax return and (b) the amount of tax that would have been paid by FTL if it had filed separate tax returns for the periods it was included in the consolidated Federal income tax return of TI. (See order 73-11-8).

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